Land and Environment Court

New South Wales

Medium Neutral Citation:	**George D Angus Pty Limited v Health Administration Corporation [2013] NSWLEC 212**
Hearing dates:	25, 26, 29 & 30 July and 1, 2 & 8 August 2013
Decision date:	16 December 2013
Before:	Preston CJ
Decision:	Directions as set out at [201]
Catchwords:	COMPULSORY ACQUISITION - land used by applicant for the purpose of a medical practice offering gynaecological and obstetric services acquired by respondent - applicant relocated medical practice twice - claim made for loss attributable to disturbance - consideration of statutory scheme for compensation - nature of applicant's interest in the acquired land - whether applicant satisfied the statutory requirements so as to be entitled to relocation costs and other financial costs - meaning of ss 55(d), 59(c) and (f) of the Land Acquisition (Just Terms Compensation) Act 1991 considered - applicant entitled to compensation for costs of first relocation to new premises but not second relocation - applicant entitled to compensation for financial losses it incurred during the period it practised at the first new premises to which it relocated but not the second new premises - losses at the second new premises neither reasonably incurred nor a direct and natural consequence of acquisition - respondent to pay applicant's costs of the proceedings
Legislation Cited:	Conveyancing Act 1919 s 127 Land Acquisition (Just Terms Compensation) Act 1991 ss 4, 11, 12, 13, 14, 19, 20, 37, 39, 41, 42, 44, 45, 46, 55, 56, 57, 58, 59, 60, 61, 66(1), 68 Land and Environment Court Act 1979 ss 19, 24, 25, 37 Lands Acquisition Act 1989 (Cth) Public Works Act 1912 s 124

Cases Cited:

Al Amanah College Inc v Minister for Education and Training (No 2) [2011] NSWLEC 254
Almona Pty Ltd v Roads and Traffic Authority (NSW) [2008] NSWLEC 112; (2008) 160 LGERA 375
Arkaba Holdings Ltd v Commissioner of Highways [1970] SASR 94
Blacktown Council v Fitzpatrick Investments [2001] NSWCA 259
Bligh v Minister Administering the Environmental Planning and Assessment Act [2011] NSWLEC 220
Boland v Yates Property Corporation Pty Ltd [1999] HCA 64; (1999) 74 ALJR 209
Caruana v Port Macquarie-Hastings Council [2007] NSWLEC 109
Chelsea Investments Pty Ltd v Federal Commissioner of Taxation (1966) 115 CLR 1
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Horton v Wyong Shire Council (No 2) [2005] NSWLEC 45
House of Peace Pty Ltd v Bankstown City Council [2000] NSWCA 44; (2000) 48 NSWLR 498
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Johnson v Roads and Traffic Authority (NSW) [2000] NSWLEC 111
Lace v Chantler [1944] KB 368
Lasermax Engineering Pty Ltd v QBE Insurance (Aust) Ltd [2005] NSWCA 66
Leichhardt Council v Roads and Traffic Authority (NSW) [2006] NSWCA 353; (2006) 149 LGERA 439
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Marshall v Director General, Department of Transport [2001] HCA 37; (2001) 205 CLR 603
Mayfair Ltd v Pears [1987] 1 NZLR 459
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Peter Croke Holdings Pty Ltd v Roads and Traffic Authority of NSW (1998) 101 LGERA 30
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Roads and Traffic Authority of NSW v Heawood [2002] NSWCA 99; (2002) 54 NSWLR 289
Sydney Water v Besmaw [2002] NSWCA 147
Sydney Water Corporation v Caruso [2009] NSWCA 391; (2009) 170 LGERA 298
The Commonwealth v Milledge (1953) 90 CLR 157
The Commonwealth v Reeve (1949) 78 CLR 410
Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority [2008] HCA 5; (2008) 233 CLR 259

	West v Roads and Traffic Authority of NSW (1995) 88 LGERA 266 Wilson v Meudon Pty Ltd [2005] NSWCA 448
Texts Cited:	ALRC Report No 14, Land Acquisition and Compensation (Canberra, 1984) Macquarie Dictionary (4th ed, 2005) R Meagher, D Heydon and M Leeming, Meagher, Gummow and Lehane's Equity Doctrines and Remedies (LexisNexis Butterworths, 4th ed, 2002)
Category:	Principal judgment
Parties:	George D Angus Pty Limited (Applicant) Health Administration Corporation (Respondent)
Representation:	Mr I J Hemmings SC with Mr S B Nash (Applicant) Mr T S Hale SC with Miss M R M Carpenter (Respondent) Elson Pow & Associates (Applicant) Crown Solicitor's Office (Respondent)
File Number(s):	31234 of 2011
Publication restriction:	No

JUDGMENT

A MEDICAL PRACTICE'S OCCUPATION IS DISTURBED

1 The Health Administration Corporation ('HAC') compulsorily acquired the land in Lot 4 of Section B of Deposited Plan 13345, known as 10 Yabtree Street, Wagga Wagga ('the Yabtree Street land') on 22 July 2011. The registered owner of the estate in fee simple was Benantra Pty Ltd ('Benantra'). The sole director and shareholder of that company is Mrs Wendy Angus, the wife of Dr George Angus. Another company, George D Angus Pty Limited ('GDA'), occupied the land. The sole director of GDA is Dr George Angus. Dr Angus and Mrs Angus held 50% of the shares in GDA each. The legal basis on which GDA occupied the land was in dispute. This will need to be decided to determine whether GDA had an interest in the land that was extinguished by the acquisition of the Yabtree Street land and in respect of which GDA is entitled to be paid compensation.

2 GDA provided gynaecological and obstetric services from its premises on the Yabtree Street land through Dr Angus. GDA was, in effect, Dr Angus' service company. Dr Angus provided the gynaecological and obstetric services for

which GDA billed the patients. GDA paid a salary to Dr Angus. GDA also employed Mrs Angus as an officer manager.

3 The land was advantageously located in physical proximity to the public Wagga Wagga Base Hospital ('the base hospital') and Calvary Hospital. This allowed Dr Angus to walk to each hospital to attend obstetric patients within 5 minutes. This was said to be an attribute of the land of special advantage to Dr Angus.

4 After the land was compulsorily acquired, GDA leased premises at 90 Peter Street, Wagga Wagga ('the Peter Street land'). GDA relocated its practice from the Yabtree Street land to the Peter Street land on 23 September 2011. GDA incurred financial costs in connection with this relocation.

5 The location of the Peter Street land was physically more distant from the base hospital and Calvary Hospital than the location of the Yabtree Street land. Dr Angus considered that the travel time (by car) from the Peter Street land would be greater than 5 minutes, increasing the risk for the obstetric patients to a level that Dr Angus deemed unacceptable. Dr Angus therefore ceased providing obstetric services for GDA from the Peter Street land, instead restricting himself to providing gynaecological services only. The provision of only gynaecological services, and not obstetric services, caused a decline in the income and profitability of GDA's business.

6 GDA, through Dr Angus, provided gynaecological services at the Peter Street premises from 23 September 2011 (after the practice was relocated) until 14 June 2013 (when GDA closed the practice). On 5 July 2013, GDA relocated its practice from the Peter Street land to new premises in Newcastle, where GDA, through Dr Angus, commenced practising obstetrics. In so doing GDA again incurred financial costs in connection with this relocation.

7 GDA, through Dr Angus, reversed the services it provided in Newcastle from those it had provided at the Peter Street land in Wagga Wagga. That is to say, GDA, through Dr Angus, provided only obstetric services in Newcastle, but not gynaecological services. GDA contended that its future income and profitability from the provision of only obstetric services, and not gynaecological services, in Newcastle will be less than the income and profitability that it would have earned if it had been able to continue the practice of providing both gynaecological and obstetric services at the Yabtree Street land.

THE CLAIM FOR COMPENSATION FOR DISTURBANCE LOSSES

8 Both Benantra and GDA lodged claims for compensation with HAC which had acquired the Yabtree Street land. HAC offered compensation to each of Benantra and GDA in the amounts determined by the Valuer-General. For GDA, this was $287,815. Benantra and GDA did not accept the amount of compensation offered but instead lodged with this Court objections to the amount of compensation offered. Benantra's claim was settled prior to being heard and disposed of by this Court. GDA's claim for compensation, however, continued and is the subject of these proceedings.

9 GDA contended that the amount of compensation to which it is entitled should be assessed having regard only to losses attributable to disturbance (under s 55(d) of the *Land Acquisition (Just Terms Compensation) Act 1991* ('the Act'). GDA contended that these losses fell into two categories:

(a) financial costs in connection with GDA's relocation of its practice, first, from the Yabtree Street land to the Peter Street land (agreed to be $16,129.22) and, secondly, from the Peter Street land to Newcastle (claimed by GDA to be $19,721.00) (claimed to be within s 59(c) of the Act); and

(b) loss of income or profit from GDA's business at, first, the Peter Street land and, secondly, Newcastle, compared to the income or profit GDA would have earned at the Yabtree Street land (claimed to be within s 59(f) of the Act).

10 GDA did not claim that its interest in the Yabtree Street land extinguished by the acquisition had any market value (s 55(a) of the Act) or special value (s 55(b) of the Act). The other matters in s 55(c), (e) and (f) were not applicable.

11 HAC accepted that GDA had an interest in the land, which HAC contended was a leasehold interest, determinable on one month's notice, that had been extinguished and that GDA was therefore entitled under s 37 of the Act to be paid compensation. HAC contended, however, that the limited nature of GDA's interest in the land affected the amount of compensation to which GDA was entitled. HAC contended that the amount of compensation to which GDA was entitled was limited to one type of loss attributable to disturbance, being the financial costs reasonably incurred in connection with the relocation from the Yabtree Street land to the Peter Street land ($16,129.22). HAC otherwise disputed GDA's entitlement to the claimed further relocation costs from the Peter Street land to Newcastle (as not being within s 59(c) of the Act) or the claimed loss of income or profit of GDA (as not being within s 59(f)).

12 HAC's contentions, and GDA's response, necessitate analysis of the statutory scheme for compensation and construction of the meaning and scope of s 55(d) and s 59(c) and (f) of the Act. I will address this in the next section. I will

then apply the construction of the statutory provisions to the evidence of GDA's actions and its claimed financial costs and losses. Again, HAC's contentions and GDA's response necessitate determining whether GDA's actions and its claimed financial costs and losses fall within the meaning and scope of the heads of compensation as properly construed. I will finally determine the amount of compensation to which GDA is entitled. There will need to be a calculation of the interest payable on the amounts I determine. I will direct the parties to agree and file with the Court a schedule calculating the interest on these amounts. I will then make final orders determining GDA's claim for compensation by awarding the total amount of compensation payable.

13 In hearing these proceedings, I have been assisted by Acting Commissioner Parker under s 37(1) of the *Land and Environment Court Act 1979* ('the Court Act').

THE STATUTORY SCHEME FOR COMPENSATION

The acquisition of land by compulsory acquisition

14 HAC is an authority of the State that is authorised to acquire land by compulsory process. Before HAC could acquire the Yabtree Street land by compulsory process, it was required to give the owners of the land written notice of its intention to do so (s 11(1) of the Act). A proposed acquisition notice need only to be given to owners of the land who have a registered interest in the land, are in lawful occupation of the land, or have, to the actual knowledge of the authority of the State, an interest in the land (s 12(1)). HAC gave a proposed acquisition notice to each of Benantra and GDA on 10 May 2011 and 13 May 2011 respectively.

15 The usual minimum period of notice of the proposed acquisition that a proposed acquisition notice must give is 90 days (s 13(1)). However, a shorter period of notice may be given if either the authority and the owners of the land agree in writing to the shorter period (s 13(2)(a)) or the Minister responsible for the authority approves of the shorter period having being satisfied that the urgency of the matter or other circumstances of the case make it impracticable to give any longer period of notice (s 13(2)(b)).

16 In this case, Benantra and GDA did not agree to a shorter period but the Minister responsible for HAC did approve the shorter period of 60 days in lieu of 90 days. The Minister's reasons related to the urgent need to redevelop the base hospital.

17 As required by s 14(1) of the Act, as soon as practicable after the expiration of the minimum period of notice of the proposed compulsory acquisition, HAC acquired the Yabtree Street land by compulsory process. The Minister for Health declared, by notice published in the Gazette on 22 July 2011, that the Yabtree Street land, described in the notice, was acquired by compulsory process (s 19(1)).

18 The publication of the acquisition notice on that date had two effects. First, the Yabtree Street land was vested in HAC and "freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, easements, rights, charges, rates and contracts in, over or in connection with the land" (s 20(1)). Hence, HAC acquired the Yabtree Street land freed and discharged from whatever interest in the Yabtree Street land was held by GDA.

19 Secondly, each owner of an interest in the Yabtree Street land which was divested, extinguished or diminished by the acquisition notice became entitled to be paid compensation in accordance with Pt 3 of the Act by HAC (s 37). The entitlement to compensation arose at the moment of acquisition: *Minister for Army v Parbury Henty & Co Pty Ltd* (1945) 70 CLR 459 at 514. An interest in land is divested by acquisition of the whole of the interest of the person, which interest survives in the hand of the authority which acquired the land. An interest in land is extinguished by being inconsistent with the interest in the land acquired by the authority. An interest in land is diminished by reason of acquisition by the authority of part of the interest of the person.

An interest in land

20 The entitlement to compensation under s 37 is conferred only on an owner who has been deprived of an "interest in land". An "interest in land" is defined in s 4(1) of the Act to mean:

> (a) a legal or equitable estate or interest in the land; or
>
> (b) an easement, right, charge, power or privilege over, or inconnection with, the land.

21 Paragraph (a) of the definition of interest in land includes a legal estate in the land, such as a registered estate in fee simple, a legal interest in the land, such as registered leasehold interest and an equitable estate or interest, such as the examples given in R Meagher, D Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) at [4-015].

22 A company which had been in occupation and exclusive possession for 20 years of land owned by its parent company (although not the subject of a written lease agreement) was held to have had an interest in the acquired land within paragraph (a) of the definition, being probably a periodic tenancy from year to

year (either at common law or in equity) or at the very least a statutory tenancy at will in terms of s 127(1) of the *Conveyancing Act 1919* ('the Conveyancing Act'): *Peter Croke Holdings Pty Ltd v Roads and Traffic Authority of NSW* (1998) 101 LGERA 30 at 35.

23 Caravan owners who had exclusive occupation and possession of sites in a caravan park owned by a company controlled by the caravan owners under a tenancy at will were held to have had an interest in the acquired land within paragraph (a) of the definition: *Mooliang Pty Ltd v Shoalhaven City Council* [2001] NSWLEC 83; (2001) 114 LGERA 45 at [40].

24 On the other hand, a mere contractual licence to use part of acquired land has been held not to create a legal or equitable interest in the land within paragraph (a) of the definition: *West v Roads and Traffic Authority of NSW* (1995) 88 LGERA 266 at 274.

25 The rights falling within paragraph (b) of the definition of interest in land are wider than those falling within paragraph (a). However, the rights still need to be of a proprietary or quasi-proprietary nature: they are limited to "jura in re aliena, proprietary or quasi-proprietary rights less than a fully-fledged estate, that is easements, charges, profits à prendre, profits à rendre, licences coupled with interests, etc"; *Hornsby Council v Roads and Traffic Authority of NSW* (1997) 41 NSWLR 151 at 155 per Meagher JA. The rights described in paragraph (b) of the definition and the examples given by Meagher JA of proprietary or quasi-proprietary rights are either corporeal or incorporeal hereditaments: *Jax Franchising Systems Pty Ltd v State Rail Authority (NSW)* [2003] NSWLEC 397 at [12].

26 The words in the definition of interest in land need to be construed in context: "Part of that context is the colour which each part of the overlapping definition takes from its associates. Even more critical to that context is the reference to *ownership* of an interest in s 37 of the *Land Acquisition (Just Terms Compensation) Act*": *Hornsby Council v Roads and Traffic Authority of NSW* at 152 per Mason P (emphasis in original).

27 A local council which had, under the relevant local government legislation, the care, control and management of Crown land reserved for public recreation that was compulsorily acquired was held not to have had an interest in the land: *Hornsby Council v Roads and Traffic Authority of NSW* at 152, 155, 157. It had no right of exclusive occupancy over the land.

28 Similarly, a franchisor which had a franchising agreement with a franchisee licensed to conduct a tyre retailer franchise on land that was acquired was held not to have had an interest in the land within paragraph (b) of the definition. The franchisor had no ownership of a proprietary or quasi-proprietary right. Any benefit it received under the franchising agreement was

not an incident of any use of the land by the franchisor. It did not occupy or use the land at all: see *Jax Franchising Systems Pty Ltd v State Rail Authority (NSW)* at [11]-[14].

29 The company that had a right under a contractual licence from the owners of land that was compulsorily acquired to use part of that land as an office, in consideration of an obligation to pay certain expenses, was held to have had a privilege over or in connection with the acquired land: *West v Roads and Traffic Authority of NSW* at 274.

30 Similarly, caravan owners having rights of exclusive occupancy and possession of sites in a caravan park owned by a company of which the caravan owners were directors and shareholders were held to have had privileges in connection with the land within paragraph (b) of the definition: *Mooliang Pty Ltd v Shoalhaven City Council* at [47], [48].

31 Each of these cases involved a right of occupancy on a more secure footing than a common licence.

32 A person's occupation of an area of Crown land under a permissive occupancy was also held to amount to a right, privilege or power over, or in connection with, the land: *Rakus v Energy Australia* [2004] NSWLEC 657; (2004) 138 LGERA 373 at [20], [21].

33 Rights of a kind described in paragraphs (a) and (b) of the definition of interest in land need not only be "over" the land acquired; they can also be "in connection with" the land acquired. Hence, the owner of land adjoining a public road that was compulsorily acquired was held to have an interest in connection with the acquired land that was extinguished by the acquisition, being the right the owner formally enjoyed, as owner of land adjoining the road, to gain access to and from the public road: *Minister for Education and Training v Tanner* [2003] NSWCA 164; (2003) 128 LGERA 281.

34 I will return to the interest that GDA had in the Yabtree Street land later.

The claim for compensation

35 In order to receive compensation, a person who is entitled to and wishes to claim compensation must lodge a claim for compensation under Pt 3 of the Act with the authority that is acquiring the land (s 39(1)). A person who does not receive a compensation notice may nevertheless lodge a claim for compensation (s 46(1)). The claim for compensation must be in the form prescribed by the regulations or the form approved by the Minister (s 39(2)).

36 In this case, GDA lodged a claim for compensation in the appropriate form on 16 July 2011. This preceded the date of acquisition (on 22 July 2011) but proceeded the proposed acquisition notice given by HAC (on 13 May 2011). GDA's claim for compensation asserted an interest in the land as "lessee". GDA claimed under only the item of "any loss attributable to disturbance" in the amount of $1,600,000. In the annexure, this amount was broken down to be $1,500,000 for "lost income/business disturbance, current and ongoing" and $100,000 for relocation costs.

37 As soon as practicable after receiving a claim for compensation, the authority is required to give the Valuer-General a copy of the claim (s 41(1)). The Valuer-General is to determine the amount of compensation to be offered to each person entitled to compensation under Pt 3 of the Act. The amount of compensation is to be assessed and determined under Pt 3 of the Act. I will explain this process of assessment later.

38 In this case, on 10 October 2011, the Valuer-General determined the amount of compensation to be offered to GDA as $287,815. This amount was wholly attributable to disturbance under s 55(d) of the Act, all other matters being nil or not applicable (in the case of solatium).

The offer of compensation

39 The authority which has compulsorily acquired the land is then required to give the former owners of the land written notice of the compulsory acquisition, their entitlement to compensation, and the amount of compensation offered (as determined by the Valuer-General) (s 42(1)). HAC gave this required compensation notice to GDA on 10 October 2011, offering compensation in the amount of $287,815 as determined by the Valuer-General.

40 A person entitled to compensation under Pt 3 of the Act may accept the amount of compensation offered in the compensation notice (s 44(1)) or lodge with the Land and Environment Court an objection to the amount of compensation offered (s 66(1)). The Act does not prescribe (in s 44) a time limit within which acceptance of the amount of compensation offered must occur but does prescribe (in s 66(1)) a time period of 90 days after receiving a compensation notice within which lodgement of an objection to the amount of compensation offered should occur (although the Court may nevertheless hear and dispose of the person's claim for compensation if satisfied that there is good cause for the person's failure to lodge the objection within that period: see s 66(3)).

41 If the person entitled to compensation does not, within 90 days after receiving the compensation notice, either accept the amount of compensation offered or lodge an objection to the amount of compensation offered, the person is deemed to have accepted the offer of compensation (s 45(1)). However, a

person who lodges an objection to the amount of compensation offered may still accept the offer of compensation under s 44, which can give rise to an agreement reached during the proceedings (s 68(1) of the Act): see *Niezabitowski v Roads and Traffic Authority* (NSW) [2006] NSWLEC 462; (2006) 147 LGERA 417 at [33]-[35], [43], [44], [47].

Objection to the amount of compensation offered

42 In this case, GDA lodged an objection to the amount of compensation offered by HAC by filing an application in the Court on 22 December 2011 within the 90 day period prescribed by s 66(1) of the Act. Once GDA's objection was duly lodged, the Court was required to hear and dispose of GDA's claim for compensation (s 66(2) of the Act and s 24(1) of the Court Act). GDA's claim for compensation that the Court is required to hear and dispose of is the claim GDA lodged under s 39 of the Act on 16 July 2011.

43 The Court hears and disposes of GDA's claim for compensation in Class 3 of the Court's jurisdiction (s 19(e) of the Court Act). The Court is, for the purpose of determining the claim for compensation, to give effect to the relevant provisions of the Act that prescribe a basis for, or matters to be considered in, the assessment of compensation (s 24(2) of the Court Act). In hearing and disposing of GDA's claim for compensation, the Court has jurisdiction to determine the nature of the estate or interest of GDA in the Yabtree Street land and the amount of compensation (if any) to which GDA is entitled (s 25(1) of the Court Act).

44 GDA, as directed by the Court, filed and served points of claim. Points of claim are intended to particularise the person's claim for compensation under Part 3 of the Act including the amount of compensation payable and the components thereof by reference to each of the relevant matters in s 55 of the Act (see Practice Note Class 3 Compensation Claims at [31]). However, points of claim cannot be used as an alternative means to lodge a new claim for compensation under Part 3 of the Act. The Court's jurisdiction is to hear and dispose of the claim for compensation under Part 3 of the Act that the person lodged with the authority that acquired the land (lodged under s 39(1) or s 46(1) of the Act): see s 66(2) of the Act and s 24(1) of the Court Act. It is that claim for compensation in respect of which the authority offered the amount of compensation determined by the Valuer-General, and, in turn, that amount of compensation offered which forms the basis of the person's objection lodged with the Court.

45 In this case, GDA's amended points of claim sought compensation in the amount of $8,965,675.22 or alternatively $6,633,240.22 or alternatively $6,265,328.22, depending on the method adopted for assessing losses attributable to disturbance under s 55(d) of the Act. The losses attributable to

disturbance were broken down into two categories in s 59 of the Act, being financial costs reasonably incurred in connection with relocation of GDA's business (under s 59(c) of the Act) and any other financial costs reasonably incurred or that might reasonably be incurred in GDA's business (under s 59(f)). The total of the alternative amounts claimed for compensation are far in excess of the amount claimed in GDA's claim for compensation lodged with HAC on 16 July 2011 of $1,600,000; the bases of assessment of each category of loss attributable to disturbance were different; and additional financial costs in connection with a second relocation of GDA's business were added. All other matters under s 55 of the Act were attributed a nil value in the amended points of claim.

Entitlement to just compensation

46 The amount of compensation to which a person is entitled is to be determined under Pt 3 of the Act, in particular under Div 4 of Pt 3 which prescribes the basis for and the matters to be considered in the assessment of compensation. The terms of this legislation are determinative.

47 Section 54(1) provides that:

> The amount of compensation to which a person is entitled under this Part is such amount as, having regard to all relevant matters under this Part, will justly compensate the person for the acquisition of the land.

48 Four points should be noted about this provision. First, the reference to the amount of compensation to which a person "is entitled under this Part" is a reference to the person's entitlement to compensation under s 37 of the Act (in Div 1 of Pt 3) that arises on acquisition of the land.

49 Secondly, "the amount of compensation" to which a person is entitled is one amount only, notwithstanding that in determining that one amount regard may be had to a number of relevant matters under Div 4 of Pt 3. A person is not entitled to separate amounts of compensation for each of the matters under s 55 of the Act.

50 Thirdly, the amount of compensation is to be determined "having regard to all relevant matters under this Part". The matters under Pt 3 which may be relevant are the matters listed in s 55 (as assessed in accordance with Div 4 of Pt 3). The matters identified in s 55 constitute "an exhaustive list to which regard must be had when determining the amount of compensation under s 54": *Leichhardt Council v Roads and Traffic Authority (NSW)* [2006] NSWCA 353; (2006) 149 LGERA 439 at [37]; *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2008] HCA 5; (2008) 233 CLR 259 at [13]. The relevant matters from this exhaustive list are those which are relevant to the interest in the land acquired and the owner of that interest.

51 Fourthly, the amount of compensation to which a person is entitled is not only to be determined having regard to the relevant matters but also is to be such amount as will "justly compensate" the person for the acquisition of the land. This has been referred to as the "just compensation override". In *Leichhardt Council v Roads and Traffic Authority (NSW)* at [28], Spigelman CJ observed that the Act was clearly influenced by the *Lands Acquisition Act 1989* (Cth) which was based on the report of the Australian Law Reform Commission (ALRC Report No 14, *Land Acquisition and Compensation* (Canberra, 1984)). The ALRC Report noted that a statutory list of matters to which regard must be had in determining the amount of compensation:

> in the overwhelming majority of cases, will provide just compensation to the claimant. However, cases may arise where that list will provide a measure of compensation which, in the opinion of the court, is inadequate properly to compensate the loss. It is important, in terms of both constitutionally validity and justice to the claimant, to provide a means whereby the court may increase the award of compensation to a figure which, in its judgment, will fully compensate the loss. With this in mind it would be desirable to start the statutory list by a formula providing that the amount of compensation payable to a person who had an interest that has been divested, extinguished or diminished by the acquisition is such amount as will justly compensate the person in respect of the acquisition (at [237]).

52 Spigelman CJ also noted in *Leichhardt Council v Roads and Traffic Authority (NSW)* at [28] that:

> This recommendation is clearly reflected in s 54 and s 55. Indeed, the New South Wales Parliament, unconstrained by a Constitutional requirement of just terms, could and did go further by making the list an exhaustive one.

Relevant considerations in determining the amount of compensation

53 As noted, s 55 contains an exhaustive list of the relevant matters to be considered in determining the amount of compensation to which a person is entitled. Section 55 provides:

> In determining the amount of compensation to which a person is entitled, regard must be had to the following matters only (as assessed in accordance with this Division):
>
> (a) the market value of the land on the date of its acquisition,
>
> (b) any special value of the land to the person on the date of its acquisition,
>
> (c) any loss attributable to severance,
>
> (d) any loss attributable to disturbance,
>
> (e) solatium,
>
> (f) any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.

54 Not only does s 55 exhaustively list the relevant matters, it also requires that the matters be assessed in accordance with Div 4 of Pt 3 of the Act. Thus, "market value" in s 55(a) is to be assessed in accordance with s 56; "special value" in s 55(b) is to be assessed in accordance with s 57; "loss attributable to severance" in s 55(c) is to be assessed in accordance with s 58; "loss attributable to disturbance" in s 55(d) is to be assessed in accordance with s 59; and "solatium" in s 55(e) is to be assessed in accordance with s 60.

55 The matters in s 55 do not necessarily operate to the entire exclusion of each other: *Mir Bros Unit Constructions Pty Ltd v Roads & Traffic Authority of NSW* [2006] NSWCA 314 at [55], [56]. Section 55 also does not prevent two or more matters contained in the section being taken into account in a combined way: *Mir Bros Unit Constructions Pty Ltd v Roads & Traffic Authority of NSW* at [57].

56 The terms of s 55 and ss 56-60 are determinative. It should not be assumed that they reproduce or attempt to reproduce an understanding of "principles" derived by way of judicial gloss upon the spare terms of similar provisions of earlier legislation: *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* at [47]. Nor should the court, in construing the statutory provisions of Div 4 of Pt 3 of the Act, slavishly follow judicial decisions of another jurisdiction in respect of similar or even identical legislation: *Marshall v Director General, Department of Transport* [2001] HCA 37; (2001) 205 CLR 603 at [62]; *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* at [31].

57 For example, the traditional concept of "value to the owner" should not be imported into the expressly defined matters of market value, special value, disturbance and severance. The concept of "value to the owner" was developed as a gloss on the statutory words "value of the land" or equivalent (such as in s 124 of the *Public Works Act 1912*). The concept of value to the owner was a unifying concept which encompassed market value, special value, disturbance and severance: *Leichhardt Council v Roads and Traffic Authority (NSW)* at [24].

58 However, the Act adopted an exhaustive statutory list of matters to be considered in determining the amount of compensation instead of the vague concept of "value to the owner", consistent with the recommendation of the ALRC (at [236]). Section 55 of the Act requires that separate consideration be given to each of its sub-paragraphs and to each of the definitions in ss 56-60 of the Act. The concept of "value to the owner" has no operative function: *Leichhardt Council v Roads and Traffic Authority (NSW)* at [27]. As a consequence, prior case law that characterised a statutory formulation of "value of the land" as being "value to the owner" must be treated with care. Neither the formulation nor the characterisation is applicable to the statutory provisions in the Act: *Leichhardt Council v Roads and Traffic Authority (NSW)*

at [29].

59 Another example is the concept of special value. Special value now means what s 57 says it means, namely "the financial value of any advantage, in addition to market value, to the person entitled to compensation which is incidental to the person's use of the land." Early judicial decisions gave a different meaning to the concept of special value and also included losses attributable to disturbance, including business disturbance, within the concept of special value: see *Pastoral Finance Association Ltd v The Minister* [1914] AC 1083 at 1088, 1089; *Horn v Sunderland Corporation* [1941] 2 KB 26 at 33, 45, 51-52; *The Commonwealth v Reeve* (1949) 78 CLR 410 at 417-420, 425, 434-436; *The Commonwealth v Milledge* (1953) 90 CLR 157 at 164; *Housing Commission of NSW v Falconer* [1981] 1 NSWLR 547 at 556-557, 572-574; and *Boland v Yates Property Corporation Pty Ltd* [1999] HCA 64; (1999) 74 ALJR 209 at 226. This was because earlier judicial decisions were assessing the value to the owner of the land and such value was to be assessed taking into consideration the loss of the business that the owner conducted on the land or the loss of trade or production involved during the period of relocation of the business to other premises. As was said in *Housing Commission of NSW v Falconer*:

> Thus, where the owner is carrying on a business on the land, that which is resumed is the land but the effect of the resumption may be to extinguish the business, or even to pass the benefit of the intangible elements of it to the resuming authority. But it has been repeatedly said that the owner is not compensated for the loss of the business as such: it, and its loss, are taken into account only if and in so far as they constitute an element in the value of the land. ...
>
> It is upon the basis of the "value to the owner" principle that amounts variously described for "disturbance" and the like have been awarded. Thus the court has taken into account, as part of the special value of the land to the owner or occupier, the costs which he would incur in moving to other equivalent premises, the loss of trade or production involved during the period of the move, and the cost of setting up in the new premises (at 572-573).

60 This value to the owner approach informed the formulation of special value as involving what "a prudent purchaser in the position of the owner, that is to say with a business such as the owner's already established on the land, would find it worth his while to pay sooner than fail to obtain the land": *The Commonwealth v Milledge* at 164; *Arkaba Holdings Ltd v Commissioner of Highways* [1970] SASR 94 at 100; *Housing Commissioner of NSW v Falconer* at 573; *Boland v Yates Property Corporation Pty Ltd* at 225.

61 The Act adopted a different approach to special value in three ways: first, it separated the concepts of "market value", "special value" and "loss attributable to disturbance"; secondly, it introduced a new formulation of "special value" (that in s 57); and thirdly, it exhaustively defined "loss attributable to disturbance" (in s 59) separately from "special value". Hence, earlier case law on special value and disturbance must be treated with care.

62 This separation of "loss attributable to disturbance" from "market value" and "special value" results in loss attributable to disturbance in s 55(d) being a separate basis of compensation independent of the market value of the land (in s 55(a)) and any special value of the land (in s 55(b)): see generally *Peter Croke Holdings Pty Ltd v Roads and Traffic Authority of NSW* at 40 and *Roads and Traffic Authority (NSW) v McDonald* [2010] NSWCA 236; (2010) 175 LGERA 276 at [38], [127], [132].

Loss attributable to disturbance

63 The matter of "any loss attributable to disturbance" in s 55(d), to which regard must be had in determining the amount of compensation to which a person is entitled, is defined in s 59. Section 59 provides:

> ***loss attributable to disturbance*** of land means any of the following:
>
> (a) legal costs reasonably incurred by the persons entitled to compensation in connection with the compulsory acquisition of the land,
>
> (b) valuation fees reasonably incurred by those persons in connection with the compulsory acquisition of the land,
>
> (c) financial costs reasonably incurred in connection with the relocation of those persons (including legal costs but not including stamp duty or mortgage costs),
>
> (d) stamp duty costs reasonably incurred (or that might reasonably be incurred) by those persons in connection with the purchase of land for relocation (but not exceeding the amount that would be incurred for the purchase of land of equivalent value to the land compulsorily acquired),
>
> (e) financial costs reasonably incurred (or that might reasonably be incurred) by those persons in connection with the discharge of a mortgage and the execution of a new mortgage resulting from the relocation (but not exceeding the amount that would be incurred if the new mortgage secured the repayment of the balance owing in respect of the discharged mortgage),
>
> (f) any other financial costs reasonably incurred (or that might reasonably be incurred), relating to the actual use of the land, as a direct and natural consequence of the acquisition.

64 Three points should be noted about s 59 at the outset. First, the "land" referred to in the phrase "loss attributable to disturbance of land" is the acquired land: *Roads and Traffic Authority (NSW) v Peak* [2007] NSWCA 66 at [99].

65 Secondly, this formulation of the phrase "loss attributable to disturbance of land" in s 59 exhaustively lists the losses that can be recovered as disturbance. GDA's claimed financial losses must, therefore, fall within one or more of these categories of losses in s 59. GDA claims it has incurred financial costs falling within s 59(c) and (f). I will address these claims below.

66 Thirdly, the financial costs described in s 59(a)-(f) are not interchangeable. Of relevance to GDA's claims, costs cannot be claimed interchangeably between paragraphs (c) and (f). If costs could be claimed interchangeably between (c) and (f), there would be no point in having both statutory provisions: *Roads*

and Traffic Authority (NSW) v Peak at [100].

Financial costs in connection with relocation

67 I now turn to address paragraph (c) of s 59. There are five requirements in order for costs to fall within s 59(c).

"financial costs"

68 First, the costs must answer the description of being "financial costs". The concept of "financial costs" clearly includes costs in the nature of expenses or expenditure. The examples of costs given in parentheses in s 59(c), namely legal costs (included in s 59(c)) and stamp duty or mortgage costs (excluded from s 59(c)), are in the nature of expenses. The costs claimed by GDA as falling within s 59(c) are all in the nature of expenses. An issue in this case is whether the concept of "financial costs" in s 59(f) extends beyond expenses to include financial losses as well. I will return to this issue when addressing s 59(f) below.

"reasonably incurred"

69 Secondly, the costs must be "reasonably incurred". The use of the word "incurred" does not restrict the costs recoverable to only those costs that have been incurred prior to trial: "The words in that subparagraph [s 59(c)] are financial costs 'reasonably incurred' and not financial costs which 'have been reasonably incurred' so as to give such costs a temporal limitation as to their recovery": *Roads and Traffic Authority (NSW) v McDonald* at [45]. Hence, costs "incurred" in s 59(c) refers to costs whenever incurred as determined on the balance of probabilities: *McDonald v Roads and Traffic Authority (NSW)* [2009] NSWLEC 105; (2009) 169 LGERA 352 at [117] approved on appeal on this point of construction in *Roads and Traffic Authority (NSW) v McDonald* at [42], [46].

70 The use of the word "reasonably" qualifies the incurring of the costs, not the costs themselves. That is to say, s 59(c) does not require that the amount of the costs be reasonable, although in practice the incurring of exorbitant costs may not be able to be characterised as being "incurred reasonably": *Roads and Traffic Authority (NSW) v McDonald* at [38], [131], [143].

"in connection with"

71 Thirdly, the costs reasonably incurred must be "in connection with" the relocation of the persons entitled to compensation. The words "in connection with" are of wide meaning (*Roads and Traffic Authority (NSW) v Peak* at [97]) and merely require that there be a relationship between the costs incurred and the relocation.

"the relocation"

72 Fourthly, the costs reasonably incurred must be in connection with the "relocation". The concept of "relocation" involves moving to a different place. Ordinarily, the relocation will be from the acquired land to a different place. However, it can also include relocation from some land other than the acquired land to yet other land, provided a sufficient connection with the acquired land is established. Hence, where only a part of a parcel of land has been acquired leaving residue land, costs incurred in relocating buildings from the acquired land to the residue land will be recoverable: see *McDonald v Roads and Traffic Authority (NSW)* at [119] not challenged on appeal in *Roads and Traffic Authority (NSW) v McDonald*.

73 Whether costs incurred in relocating from one part of the residue land to another part of the residue land are recoverable will depend upon the connection with the acquired land. If the actual use of the residue land is so closely or intimately connected with the actual use of the acquired land, so that use of one is dependent on use of the other, then costs incurred in connection with relocation because of the injurious affection caused by the acquisition may be recoverable, notwithstanding that the relocation is from one part of the residue land to another: *Roads and Traffic Authority (NSW) v Peak* at [71] and [101].

74 Thus, in *McBaron v Roads and Traffic Authority (NSW)* (1995) 87 LGERA 238, the costs of relocating a dairy building located on the residue land were held to be compensable as the dairy building lost its utility as a consequence of the acquisition of the acquired land which divided the pasture land from the dairy building requiring a significant movement of cows each day for milking purposes. There was, therefore, the necessary close connection with the acquired land so that the relocation costs were claimable: *Roads and Traffic Authority (NSW) v Peak* at [71] approving *McBaron*.

75 In contrast, in *Johnson v Roads and Traffic Authority (NSW)* [2000] NSWLEC 111, the costs of removal of a house from one part of the residue land to another part should not have been held to be compensable as the cause of the relocation was the noise that would emanate from the new roadway to be built on the acquired land, rather than any close connection between the actual use of the acquired land and of the residue land by the person entitled to compensation: *Roads and Traffic Authority (NSW) v Peak* at [71] disapproving *Johnson*.

76 In *Horton v Wyong Shire Council (No 2)* [2005] NSWLEC 45, costs incurred in relocating initially from the acquired land to temporary rental accommodation on other land and then later from the rental accommodation to a new residence to be constructed on the residue land were held to be costs within s

59(c): at [20], [22] accepted as appropriate in *Roads and Traffic Authority (NSW) v McDonald* at [126]-[131].

77 The category of costs that may reasonably be incurred in connection with relocation is wide, and includes expenses in removing furniture and goods from the old premises, moving to the new premises and setting up in the new premises, including fit out costs: see *McDonald v Roads and Traffic Authority (NSW)* at [107]-[109]. It can also include replacement of essential equipment not able to be relocated: *Hua v Hurstville City Council* [2010] NSWLEC 61 at [59].

"of those persons"

78 Fifthly, the relocation, in connection with which costs are incurred, must be of "those persons", which refers to "the persons entitled to compensation" referred to in s 59(a): *Roads and Traffic Authority (NSW) v Peak* at [97].

Other financial costs as a consequence of the acquisition

79 I turn now to s 59(f) which for convenience is repeated:

> any other financial costs reasonably incurred (or that might reasonably be incurred), relating to the actual use of the land, as a direct and natural consequence of the acquisition.

80 Paragraph (f) has been described as a "catch-all" provision and, as such, its words should not be read down: *Fitzpatrick v Blacktown City Council (No 2)* [2000] NSWLEC 139; (2000) 108 LGERA 417 at [20]. The Court of Appeal dismissed an appeal against this decision but made no comment on this description of s 59(f) as a "catch-all": see *Blacktown Council v Fitzpatrick Investments* [2001] NSWCA 259. Whilst it is undoubtedly true that s 59(f) is intended to pick up financial costs not included within the other paragraphs of s 59, the ambit of paragraph (f) is limited by its terms. Only costs that meet the requirements of paragraph (f) will be claimable as losses attributable to disturbance. Viewed properly, paragraph (f) does not "catch all" financial costs; instead, it catches only those financial costs that do not fall within paragraphs (a)-(e) but do fall within paragraph (f).

81 There are four requirements for costs to fall within s 59(f).

"any other financial costs"

82 First, the costs must be "financial costs". The term "financial costs" clearly includes expenses but the issue is whether it can also include financial losses. HAC contended that it only includes expenditure and does not include loss of foregone profits from a business that ceases to operate upon acquisition of the land. HAC gave four reasons.

83 First, HAC submitted that prior to the Act, a loss suffered by a dispossessed owner by reason of disturbance of a business by compulsory acquisition of the land on which the business was conducted was not itself a separate head of compensation, but rather was compensable only as part of, and in so far as it affected, the value to the owner of the land. Hence, as Dixon J explained in *The Commonwealth v Reeve* at 428:

> You cannot simply take the profits of the business and capitalize them at a rate of interest and directly add them to whatever is thought to be the value of the land or interest therein to one who purchases it for some other purpose. That is shown by *Pastoral Finance Association Ltd v The Minister*.

84 HAC submitted that the Act did not change this approach. There is nothing in the text of the Act, and the language of s 59 in particular, that would suggest any radical departure from the pre-Act position so as to compensate a dispossessed landowner for loss of profits by capitalising business losses.

85 Secondly, HAC submitted that s 59(a)-(e) each refer only to expenditure incurred or which may be incurred by the persons entitled to compensation, being legal costs, valuation fees, relocation costs, stamp duty and mortgage costs. Section 59(f) is a "catch-all" to pick up other financial costs that have been incurred or might be incurred that do not fall with s 59(a)-(e). HAC submitted that this indicates that s 59(f) also refers to expenditure.

86 Thirdly, HAC submitted that the requirement that the financial costs be reasonably incurred necessitates that a decision be made to incur the financial costs and the decision to incur those costs will only be compensable if the decision is reasonable. HAC submitted that only expenditures are dependent on a decision; a loss of profits as a consequence of the acquisition is not dependent on a decision by the person entitled to compensation. A decision might be made by the landowner to take a particular course and that course may lead to a loss, but that loss flows from taking a particular course. The landowner is not taking a decision to incur the loss. Hence, HAC submitted that the words "reasonably incurred" support a construction of "financial costs" as being limited to expenditures and not financial losses.

87 Fourthly, HAC submitted that the decision of *Peter Croke Holdings Pty Ltd v Roads and Traffic Authority of NSW*, that business losses were recoverable as financial costs under s 59(f) of the Act, was wrongly decided and should not be followed. HAC also submitted that the statements in *Bligh v Minister Administering the Environmental Planning and Assessment Act* [2011] NSWLEC 220 at [67] and [73] and in *Al Amanah College Inc v Minister for Education and Training (No 2)* [2011] NSWLEC 254 at [53], that the value of a business, if extinguished by the resumption, is recoverable as loss attributable to disturbance under s 59(f), were obiter dicta but in any event were wrong and should not be followed.

88 GDA submitted that "financial costs" in s 59(f) were not so restricted to expenditures and can include financial losses. GDA gave five reasons.

89 First, GDA submitted that the language of s 59(f), and in particular the words "financial costs", should be construed with all the generalities that the words permit. They should not be construed on the basis that the right to compensation is subject to limitations or qualifications which are not found in the statute: *Marshall v Director General, Department of Transport* at [38] and [67], cited with approval in *Roads and Traffic Authority of NSW v Heawood* [2002] NSWCA 99; (2002) 54 NSWLR 289 at [20]; *Minister for Education and Training v Tanner* at [16]; *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* [2011] HCA 27; (2011) 243 CLR 492; (2011) 181 LGERA 331 at [33].

90 Secondly, GDA submitted that the words "costs" and "financial costs", not being defined in the Act, bear their natural and ordinary meaning. In ascertaining that meaning, regard may be had to the *Macquarie Dictionary* (described by the Court of Appeal as the "most authoritative Australian dictionary" in *House of Peace Pty Ltd v Bankstown City Council* [2000] NSWCA 44; (2000) 48 NSWLR 498 at [33]). The dictionary definitions include not only expenditure but also losses. The meanings in the *Macquarie Dictionary* (4th ed, 2005) include, as a noun:

> 1. the price paid to acquire, produce, accomplish, or maintain anything;
> 2. a sacrifice, loss or penalty;

and as transitive verb:

> 5. to require the expenditure of (money, time, labour, etc) in exchange, purchase, or payment; be of the price of; be acquired in return for;
> 6. to result in a particular sacrifice, loss or penalty;
> 7. to estimate or determine the cost of.

91 Biscoe J in *Al Amanah College Inc v Minister for Education and Training (No 2)* observed that:

> The ordinary meaning of "cost" includes not only the price paid to acquire property or services but also "a sacrifice, loss or penalty": Macquarie Dictionary at [53].

92 The meanings of the adjective "financial" are wide enough to accommodate the different meanings of "costs" namely "relating to monetary receipts and expenditures; relating to money matters; pecuniary: *financial operations*": *Macquarie Dictionary*.

93 GDA submitted that, consistent with the admonition to construe legislative provisions giving the right to compensation for disturbance in connection with the compulsory acquisition of land with all the generalities that the words permit, the words "cost" and "financial costs" should be construed as bearing

both the meaning of expenditures as well as losses.

94 Thirdly, GDA relied on judicial decisions that have held that there is no relevant difference between the use of the word "cost" in four of the subparagraphs in s 59 and the use of the word "loss" in s 61: *Sydney Water Corporation v Caruso* [2009] NSWCA 391; (2009) 170 LGERA 298 at [186] per Tobias JA (with whom Sackville AJA agreed at [190]) agreeing with Pain J in *Costantino and Maric v RTA* [2006] NSWLEC 248 at [94], [102]. Hence, GDA submitted the word "cost" in s 59(f) can include losses.

95 Fourthly, GDA submitted that there are numerous judicial decisions in which courts have held, either as the ratio decidendi or as obiter dicta, that "financial costs" in s 59(f) is not limited to pecuniary expenditure of moneys but can also comprise financial losses, such as business losses, including *Peter Croke Holdings Pty Ltd v Roads and Traffic Authority (NSW)* at 45, 63 per Bignold J (Bignold J's analysis of s 55(d), s 59(f) and s 61 of the Act was adopted without disapproval by Tobias JA in *Sydney Water Corporation v Caruso* at [166], [170]-[178], [184]-[186]); *N Stephenson Pty Ltd v Roads and Traffic Authority of NSW* (1994) 83 LGERA 248 at 262 per Talbot J; *Caruana v Port Macquarie-Hastings Council* [2007] NSWLEC 109 at [53] per Biscoe J; *Bligh v Minister Administering the Environmental Planning and Assessment Act* at [67], [73], [77], [141] per Biscoe J; and *Al Amanah College Inc v Minister for Education and Training (No 2)* at [53] per Biscoe J. GDA submitted that these decisions cannot be said to be clearly wrong and instead ought to be followed for reasons of judicial comity.

96 Fifthly, GDA submitted that the words "reasonably incurred" do not mandate a decision being made to incur financial costs and hence do not lend support to a construction of "costs" as being restricted to expenditures and not also including losses. GDA submitted that to "incur" a cost or loss means to "suffer" the cost or loss. GDA referred to the *Macquarie Dictionary* definitions of the verb "incur" of:

> 1. to run or fall into(some consequence, usually undesirable or injurious).
>
> 2. to become liable or subject to through one's own action; bring upon oneself.

97 Whilst the second meaning does import an element of voluntary action by a person, the first meaning does not and accepts that the consequence may be visited upon the person. GDA submitted that the words "reasonably incurred" in s 59(f) can bear both of these meanings and hence when coupled with "financial costs", can refer to both financial costs to which the person entitled to compensation becomes liable through their own actions as well as financial losses suffered by the person as a consequence of the compulsory acquisition of their land.

98 GDA submitted that the adverb "reasonably" does not affect this construction of "incurred", merely providing an objective standard or benchmark against which the person's claim is to be assessed, namely, is the claimed cost/loss one which can be said to have been reasonably suffered?

99 I agree with GDA's construction of the words "financial costs" in s 59(f) for the five reasons GDA gives and that I have set out above. Further, I reject HAC's argument that the language of s 59(f) is to be construed by reference to the gloss upon the formulations of the value of the land and the special value of the land to the owner in earlier legislation, including the characterisation of "value to the owner", or to earlier decisions that disturbance is not a separate head of compensation and is only compensable as part of compensation for the special value of the land to the owner. The Act adopted a different approach to earlier legislation and decisions on that legislation. The Act provided an exhaustive list of matters (in s 55 of the Act) to be considered in determining the amount of compensation to which the person is entitled, and separated and separately defined "market value", "special value" and "loss attributable to disturbance". These different legislative provisions should not be construed on the basis that the right to compensation given is subject to limitations or qualifications which are not found in the terms of the Act.

100 The natural and ordinary meanings of the words "financial costs" and "reasonably incurred" in s 59(f) permit a construction that allows compensation for not only financial expenses which the person entitled to compensation by their actions incurs, but also financial losses which the person suffers as a consequence of the acquisition. If a narrower meaning were to be selected, there would be a limitation on or impairment of the entitlement to compensation for the acquisition of land. The entitlement to compensation is an important right and hence s 59(f) should be construed with all the generality its words permit: *Marshall v Director-General, Department of Transport* at [38], [67] and *Roads and Traffic Authority of NSW v Heawood* at [20], [21].

101 The context of s 59 of the Act does not demand a narrow construction of financial costs so as to only include expenses and not also apply to losses. Even if the particular costs and fees referred to in paragraphs (a)-(e) of s 59 were to be construed as being restricted to expenses (which is not clear), that does not mean that "any other financial costs" in s 59(f) must be so restricted. Paragraph (f) is intended to catch financial costs not caught by the other paragraphs in s 59. There is nothing in the language of paragraph (f), or of the other paragraphs of s 59, which demands such a narrow construction.

102 A construction that "financial costs" includes "financial losses" has been accepted in the earlier judicial decisions on s 59 referred to above. I do not find these decisions to be clearly wrong; to the contrary, I agree with them.

"reasonably incurred (or that might reasonably be incurred)"

103 The second requirement for financial costs to fall within s 59(f) is that the financial costs be "reasonably incurred" or "might reasonably be incurred". As noted earlier in relation to s 59(c), the word "reasonably" governs the word "incurred" or "might be incurred" and not the expression "financial costs". Hence, the issue is whether the relevant costs are incurred or might be incurred reasonably, not whether those costs are reasonable in themselves. The expression "might reasonably be incurred":

> must be taken as referring to the time as at which compensation is being assessed; so that compensation is payable under this item only if the financial costs have actually been incurred or if it would, at the relevant time, be reasonable to incur them: *Sydney Water v Besmaw* [2002] NSWCA 147 at [13].

"relating to the actual use of the land"

104 The third requirement is that the financial costs reasonably incurred must be "relating to the actual use of the land". The expression "the land" in s 59(f) is a reference to the acquired land: *Blacktown Council v Fitzpatrick Investments* at [1], [10], [14], [35]; *Mir Bros Unit Constructions Pty Ltd v Roads and Traffic Authority of NSW* at [88]; *Roads and Traffic Authority of NSW v Peak* at [56], [66]. However, where there is acquisition of only part of the land, leaving residue land, if the actual use of the residue land is so intimately connected with the actual use of the acquired land, so that use of the one is dependent on use of the other, that is sufficient to bring the actual use of the residue land within s 59(f): *Roads and Traffic Authority of NSW v Peak* at [71].

105 The "use" of the land is the use by the person entitled to compensation, not the use by the acquiring authority: *Almona Pty Ltd v Roads and Traffic Authority (NSW)* [2008] NSWLEC 112; (2008) 160 LGERA 375 at [60]. The use must also be an "actual" use and not a potential future use: *Blacktown Council v Fitzpatrick Investments* at [5], [26]-[27]; *Mir Bros Unit Constructions Pty Ltd v Roads and Traffic Authority of NSW* at [88].

106 The expression "relating to" is of wide import: *Blacktown Council v Fitzpatrick Investments* at [28].

"as a direct and natural consequence of the acquisition"

107 The fourth requirement is that the financial costs reasonably incurred must be "as a direct and natural consequence of the acquisition". The word "consequence" establishes a requirement for a causal connection between the acquisition of the land and the incurring of the financial costs. Paragraph (f) speaks of "a" consequence not "the" consequence and hence does not demand that the acquisition be the sole cause of the incurring of the financial

costs; it is sufficient if it is a cause: *Blacktown Council v Fitzpatrick Investments* at [31]. A distinction also needs to be drawn between the acquisition and carrying out of the public purpose for which the acquisition was undertaken. The financial costs incurred need to be a consequence of the former not the latter: see, for example, *Roads and Traffic Authority of NSW v Peak* at [74].

108 The adjectival words "direct" and "natural" are designed to limit compensation for disturbance under s 59(f) by reference to the nature or degree of the required causal relationship: see *Caruana v Port Macquarie-Hastings Council* at [52]; *Almona Pty Ltd v Roads and Traffic Authority (NSW)* at [60]. Unless the financial costs incurred can be seen to be the "direct and natural" consequence of the acquisition, they will be irrecoverable as being too remote: *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111 at 126.

109 In *Caruana v Port Macquarie-Hastings Council* at [52], Biscoe J noted that "consequences which are direct and natural are generally foreseeable" (citing *Palmer Bruyn & Parker Pty Ltd v Parsons* [2001] HCA 69; (2001) 208 CLR 388 at [79] per Gummow J, who, in turn, was citing *Mayfair Ltd v Pears* [1987] 1 NZLR 459 at 463 per McMullin J) and that "directly caused" was to be equated with "proximate cause" (citing *Lasermax Engineering Pty Ltd v QBE Insurance (Aust) Ltd* [2005] NSWCA 66).

110 I will now turn to apply this understanding of the statutory scheme for compensation to GDA's interest in land and the disturbance it has suffered.

GDA HAD AN INTEREST IN LAND

111 Evidence as to GDA's occupation of, and right to occupy, the Yabtree Street land was principally given by Mrs Wendy Angus. Mrs Angus is the sole director and shareholder of Benantra which owned the Yabtree Street land. Mrs Angus is also a 50% shareholder in GDA, the other 50% shareholder being Dr Angus. Dr Angus is the sole director of GDA.

112 Benantra purchased the Yabtree Street land in September 1998. GDA took up exclusive occupation of the Yabtree Street land on 7 September 1998 and thereafter offered gynaecological and obstetric services through Dr Angus. GDA continued its exclusive occupation of the Yabtree Street land until it was forced to vacate by 22 September 2011 after the acquisition by HAC of the Yabtree Street land.

113 The tenancy arrangement between Benantra and GDA was informal. Mrs Angus describes the arrangement in these terms:

> 7. I recall at some stage in September 1998 that I said words to my husband, Dr Angus, to the effect of: "So Benantra will buy the land and George D Angus Pty Limited will pay rent to lease the land for as long as it needs it for the medical practice". I recall my husband replied by saying:"Yes, that can be the arrangement". I recall that at aroundthe time of that conversation my husband and I also spoke with our accountant who gave us taxation advice on how much rent the company, George D Angus Pty Ltd, should pay to Benantra Pty Limited.
>
> 8. I never saw the need to record that agreement in writing. I am married to Dr Angus and the company structures which we have created are service companies, but as I see it, it is a simple and informal, "husband and wife" arrangement, in which I always wanted to ensure that George D Angus Pty Limited had a secure place to practice. That has always been my understanding and intention.
>
> 9. At no time up to the compulsory acquisition of the Property did I ever have any intention to sell the Property or end the lease which I had given to George D Angus Pty Limited, or to in any way change the fact that George D Angus Pty Limited would be allowed to have the sole use of the Property to conduct its medical practice for as long as it was required.

114 Pursuant to that arrangement, GDA entered into exclusive occupation and possession of the Yabtree Street land and, in return, GDA paid, and Benantra accepted, rent of $7,400 per month.

115 GDA submitted that the proper characterisation of the arrangement between Benantra and GDA was of an oral lease of no fixed term, with rent of $7,400 payable per month, and with an assured occupancy for an indefinite period while ever Benantra owned the land. The arrangement was similar to that in *Peter Croke Holdings Pty Ltd v Roads and Traffic Authority of NSW* at 35.

116 HAC made four submissions regarding any lease between Benantra and GDA. First, HAC submitted that the Court would not accept Mrs Angus' evidence as to the lease arrangement. HAC submitted that it is unlikely that a conversation in those terms took place between Dr and Mrs Angus, the conversation was not previously mentioned in Mrs Angus' or Dr Angus' affidavit evidence; the terms of the conversation are not as one might expect of a conversation between husband and wife; and the likelihood of Mrs Angus recalling such a conversation in detail 15 years later is unlikely. HAC submitted, therefore, there was no lease at all.

117 Secondly, HAC submitted that if the terms of the lease were as Mrs Angus recalled then the lease came to an end in accordance with its terms upon the acquisition of the reversion from Benantra. Thus, HAC acquired no interest in the land from GDA. On that basis, GDA would be entitled to no compensation.

118 Thirdly, HAC submitted that the maximum duration of a lease must be certain or ascertainable at the time the lease commences. Thus, a lease "for the duration of the War" did not create a good leasehold interest because the term was uncertain when the agreement took effect (*Lace v Chantler* [1944] KB 368 at 370), nor did a tenancy to a teacher "to continue during the time

the said tenant is stationed at Hamilton" (*Morison v Edmiston* [1907] VLR 191), nor did a lease for a term during which shares in the capital of a company shall be personally held by the lessees (*Re Lehrer v Real Property Act* [1961] SR (NSW) 365 at 377; *Wilson v Meudon Pty Ltd* [2005] NSWCA 448 at [65]-[67]; *Raymond Pemberton v Dimitrijevic* [2001] NSWSC 54 at [10] and [33]-[36]). HAC submitted, therefore, that if Mrs Angus' evidence is accepted that the terms of the lease were for as long as was required for GDA to conduct its medical practice, the lease is void for uncertainty.

119 Fourthly, HAC submitted that, if there was no agreement as to the duration of the lease, s 127 of the Conveyancing Act deems the tenancy to be a tenancy determinable at the will of either of the parties by one month's notice in writing expiring at any time. This was the original position taken by HAC and, in the end, still was its position as HAC accepted that GDA was an owner of an interest in land which had been extinguished by the acquisition of the Yabtree Street land, and that GDA was entitled to compensation for extinguishment of its interest under s 37 of the Act, being a lease determinable at the will of either Benantra or GDA by one month's notice in writing, by dint of s 127 of the Conveyancing Act.

120 GDA contested HAC's submissions on GDA's interest in land. First, GDA submitted the Court would accept Mrs Angus' evidence as describing the effect of the tenancy agreement between Benantra and GDA.

121 Secondly, GDA submitted that HAC's submission (that GDA's interest subsisted only whilesoever Benantra owned the acquired land, and hence on acquisition of the land, there was no interest of GDA to acquire) as fundamentally flawed. GDA submitted that when the acquisition notice was published it simultaneously extinguished both Benantra's interest as well as GDA's interest, and converted both interests into claims for compensation. Benantra's interest was not extinguished prior to GDA's interest being extinguished.

122 Thirdly, GDA contested the applicability of s 127 of the Conveyancing Act, contending that s 127 is only engaged if there is no agreement as to the duration of the lease and in this case there was agreement that the lease would be of unlimited and indefinite duration.

123 Fourthly, GDA contested HAC's submission that if there was no lease, and there was only a licence, a licence was not an "interest" for the purposes of the Act. GDA submitted that a licence, especially of the kind disclosed in Mrs Angus' evidence, can be an interest in land under the Act, referring to *Rakus v Energy Australia* at [8]-[22].

124 I find that GDA had at least a statutory tenancy at will in terms of s 127(1) of the Conveyancing Act. I accept Mrs Angus' evidence as to the effect of the offer and acceptance, and the terms of the tenancy of the Yabtree Street land. Dr and Mrs Angus set up and operated two service companies, one to own the land (Benantra) and the other to run the medical practice from the land (GDA). Of course, the precise words spoken 15 years ago to implement this arrangement might not be exactly as Mrs Angus now recalls, but I accept words to that effect were highly likely words to have been exchanged between Dr and Mrs Angus. This is corroborated by the conduct of Benantra and GDA up until the acquisition of the Yabtree Street land. Benantra purchased and held the land and GDA exclusively occupied the land and paid Benantra rent in return. I accept that the term of the lease was indefinite - for so long as GDA wished to practice from the premises.

125 I find, therefore, that there was an express tenancy agreement between the landowner Benantra and the tenant GDA whereby GDA was given exclusive possession of the Yabtree Street land to conduct its medical practice, subject to GDA paying rent (in the sum later agreed between the parties to the tenancy agreement) to Benantra for an indefinite period, being for as long as GDA wished to conduct its practice on the land.

126 I do not accept that the tenancy agreement between Benantra and GDA was void for uncertainty. There was a tenancy, but no agreement as to the duration of the tenancy. To have a mutual "understanding and intention" between Benantra and GDA that GDA would be allowed to have the sole use of the land to conduct its medical practice "for as long as it was required" does not constitute an agreement as to the duration of the tenancy because the duration is unknown. But this is the precise situation addressed by s 127 of the Conveyancing Act: "if there is a tenancy, and no agreement as to its duration ...". The section cures this deficiency in the agreement by deeming the tenancy "to be a tenancy determinable at the will of either of the parties by one month's notice in writing expiring at any time". GDA's tenancy, therefore, was the statutory tenancy at will created by s 127.

127 Under the statutory tenancy, GDA had a right to exclusive possession of the Yabtree Street land as against all others, including its landlord Benantra. Such a right, flowing from contract with the landlord, is the essence of tenancy. It creates an interest in land: *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation* (1966) 115 CLR 1 at 7; *Mooliang Pty Ltd v Shoalhaven City Council* at [37]. Notwithstanding the fact that the tenancy at will could be terminated by either Benantra or GDA at any time, there was in this case a unity of interest between the landowner and the tenant (and their respective directors and shareholders) that made such a termination highly unlikely: *Mooliang Pty Ltd v Shoalhaven City Council* at [39], [46], [47]. I find

that GDA's tenancy amounted to an interest in the Yabtree Street land within paragraph (a) of the definition of interest in land.

128 In any event, however, GDA's tenancy amounted to a right or privilege within paragraph (b) of the definition of interest in land. The right of exclusive occupancy was of a proprietary or a quasi-proprietary nature, within paragraph (b): see *West v Roads and Traffic Authority of NSW* at 274; *Mooliang Pty Ltd v Shoalhaven City Council* at [42] - [48]; *Rakus v Energy Australia* at [19]-[21].

129 GDA's interest in the Yabtree Street land was extinguished upon HAC's acquisition of the land. On the date of publication of the acquisition notice, the Yabtree Street land was vested in HAC and freed and discharged from all estates and interests in, over or in connection with the land (s 20(1) of the Act). Hence, both Benantra's estate and GDA's interest in the land were extinguished simultaneously upon publication of the acquisition notice. At that moment also, Benantra and GDA became entitled to be paid compensation in accordance with Pt 3 of the Act (s 37).

130 I therefore reject HAC's submission that there was no subsisting interest of GDA in the land to be acquired after acquisition of the Yabtree Street land. The nature of the interest extinguished may affect certain matters of compensation under s 55, such as market value and special value, but it does not affect other matters, notably loss attributable to disturbance. The loss attributable to disturbance is to be assessed in accordance with s 59 of the Act and the matters in s 59 are not dependent on the nature of the interest in land extinguished, such as, in this case, the precise form of the tenancy between GDA and Benantra.

RELOCATION COSTS TO WHICH GDA IS ENTITLED

131 In this case, HAC accepted that the costs GDA incurred in relocating from the Yabtree Street land to the Peter Street land (totalling $16,129.22) were financial costs reasonably incurred in connection with the relocation of GDA within s 59(c) of the Act. However, HAC disputed that the costs GDA incurred in relocating from the Peter Street land to Newcastle (totalling $19,721) were such costs within s 59(c) of the Act on two bases. First, HAC contended that the second move was not a "relocation" within s 59(c) as the move was not from the acquired land but from other land. Secondly, HAC contended that the costs GDA incurred in connection with the second move were not "reasonably incurred". I do not agree with HAC's first contention but agree with the second.

132 The first contention challenges whether GDA's second move can be a "relocation". As I have noted above, relocation costs can be "financial costs reasonably incurred in connection with the relocation" within s 59(c) even though the relocation is not from the acquired land, provided that a connection with the acquired land is sufficiently established. The necessity for the connection with the acquired land flows from the fact that s 59 is concerned with loss attributable to disturbance of the acquired land.

133 In this case, the urgency of HAC's redevelopment of the base hospital and the acquisition of the Yabtree Street land for that purpose necessitated GDA vacating the Yabtree Street land before GDA could find suitable alternative premises located within a similar proximity to the two hospitals as the Yabtree Street land was located. GDA was therefore forced to rent temporary premises at the Peter Street land, even though GDA considered that those premises were not a suitable location from which to provide both gynaecological and obstetric services, until GDA was able to find suitable premises to which GDA could relocate permanently.

134 A move in two steps, from the acquired land to temporary premises and then from the temporary premises to permanent premises, can still be "relocation" within s 59(c): see *Horton v Roads and Traffic Authority* at [20], [22] accepted as appropriate in *Roads and Traffic Authority (NSW) v McDonald* at [126]-[131]. There is a sufficient connection in the circumstances with the acquired land. Accordingly, I find that a second relocation from the Peter Street land to another location (GDA chose to relocate to Newcastle) could still constitute a "relocation" within s 59(c) of the Act.

135 The second contention is that, even if the second move could be a relocation, the costs incurred in connection with the second move to Newcastle could not be said to be "reasonably incurred". I agree with this contention. My reason is not that the incurring of a second set of relocation costs is necessarily unreasonable because costs have already been incurred in a first relocation. Once it is accepted that there can be, in appropriate circumstances, two relocations, then it follows that a second set of relocation costs can be compensable under s 59(c), provided they are otherwise incurred reasonably. The problem in this case, however, is that the particular, second relocation undertaken by GDA to Newcastle is unreasonable. I find below, for the reasons I give, that GDA's choice of Newcastle as the location to which GDA relocated its obstetric and gynaecological practice from the Peter Street land was not reasonable and that the incurring of financial losses for the remainder of Dr Angus' working life by practising in Newcastle was also not reasonable. It logically follows that the financial costs that GDA incurred in connection with the move of its practice from the Peter Street land to Newcastle were not reasonably incurred.

136 I therefore allow the costs claimed by GDA of $16,129.22 for the first relocation, but not the costs of $19,721 for the second relocation, as costs reasonably incurred in connection with the relocation of GDA under s 59(c).

GDA'S LOSS ATTRIBUTABLE TO DISTURBANCE

HAC's argument that GDA has not incurred disturbance losses

137 I have earlier found that s 59(f) of the Act does extend to financial losses as well as financial costs. This disposes of one of the principal objections of HAC to GDA's claim for business loss attributable to disturbance of GDA's occupation of the Yabtree Street land as a consequence of the acquisition. However, HAC further contended that, if business losses are compensable under s 59(f), the amount of compensation under s 59(f) to which GDA is entitled in the circumstances is nevertheless nil. HAC gives three reasons.

138 First, the "land" referred to in s 59(f) is, in this case, GDA's interest in land, being a lease determinable on one month's notice. The "acquisition" in s 59(f) is of that lease. The assessment under s 59(f) is part of the assessment under s 54 of an amount of compensation that "will justly compensate the person for the acquisition of the land", which in this case is the lease.

139 HAC submitted that the loss that results as a direct and natural consequence from the acquisition of a lease determinable on one month's notice is the loss of security of one month's tenancy. But for the acquisition, the lease could be terminated at any time on one month's notice. The compulsory acquisition terminated the lease with immediate effect. GDA lost the period of one month to find alternative premises before the lease terminated. The measure of loss would, therefore, be the difference between GDA being immediately required to vacate and having a month to vacate. As it happened, no losses of this kind were suffered. The land was compulsorily acquired on 22 July 2011 but GDA was permitted to stay in occupation until 21 October 2011, longer than the one month's notice required under the lease. Hence, HAC submitted that GDA has not suffered any loss by the acquisition of its leasehold interest in the Yabtree Street land.

140 Secondly, in respect of GDA's losses incurred by relocating from the Yabtree Street land to the Peter Street land, HAC submitted that the losses were not "reasonably incurred". The expression "reasonably incurred" is a constraint relative to the incurring of costs, rather than the costs themselves (referring to *Roads and Traffic Authority (NSW) v McDonald* at [38]). In this case, the losses that GDA incurred by relocating from the Yabtree Street land to the Peter Street land were not "reasonably" incurred because:

(a) Benantra acted unreasonably in, first, not leasing to GDA the premises it owned at Suite 7/325-327 Edward Street, Wagga Wagga ('the Edward Street premises') which were closer to Calvary Hospital than the Yabtree Street premises were and, secondly, in not purchasing other suitably located premises that could be leased to GDA for it to provide both gynaecological and obstetric services in the same way that GDA had provided those services at the Yabtree Street land;

(b) GDA's decision to abandon the obstetrics practice upon the move to the Peter Street land was unreasonable. There was no requirement that an obstetrician have rooms within 5 minutes of a hospital; and

(c) GDA's decision not to take rooms at Calvary Hospital, which would have permitted GDA to continue to provide obstetric services, was unreasonable.

141 Thirdly, in respect of GDA's projected losses after its relocation to Newcastle, HAC submitted that such losses were not losses that "might reasonably be incurred" and were not a "direct and natural consequence" of the acquisition of the Yabtree Street land. Whether or not financial costs or losses "might reasonably be incurred" is to be determined at the time at which compensation is being assessed. Future financial costs or losses are only compensable if it would, at the date of assessment of compensation, be reasonable to incur them. HAC submitted that it was not reasonable for GDA to move to Newcastle, to a market in which Dr Angus had no established reputation or contacts, and where GDA could only practise obstetrics and not gynaecology, rather than remaining in Wagga Wagga and relocating to more suitably located premises from which GDA could practise both gynaecology and obstetrics. Hence, HAC submitted, at the date of assessment of compensation, it was not reasonable for GDA to incur the losses it will incur by its decision to relocate its practice to Newcastle.

142 HAC submitted also that the losses GDA is projected to incur by practising in Newcastle are not a direct and natural consequence of the acquisition - they are too remote. HAC submitted that the decision to move to Newcastle was made largely if not principally so as to enable Dr Angus to join his wife and children in Newcastle.

GDA's argument that it has incurred disturbance losses

143 GDA disputed each of HAC's three reasons. First, GDA submitted that even if its interest in the Yabtree Street land was a month to month lease, that did not preclude GDA obtaining compensation for losses attributable to disturbance under s 59(f). HAC's submission that GDA's loss was limited to the loss of security of one month's tenancy was incorrect. That might affect the

market value of the month to month tenancy, but it did not constrain the disturbance loss that might flow from acquisition of the Yabtree Street land which extinguished the month to month tenancy.

144 Furthermore, GDA submitted that HAC's submission depended on the assumption that the lease would have been terminated. That assumption is incorrect. Mrs Angus' evidence was that Benantra would not have terminated the lease and certainly GDA would not have done so either. It was a family arrangement with mutual interests and interconnectedness between Benantra and GDA. GDA had an assured occupancy for an indefinite period, in the same way as in *Peter Croke Holdings Pty Ltd v Roads and Traffic Authority* at 35, 40-41.

145 Secondly, GDA submitted that its relocation to the Peter Street land, and its incurring of losses by practising only gynaecology and not obstetrics at the Peter Street land, were reasonable. GDA dealt with each of HAC's three asserted aspects of unreasonableness. Benantra's conduct in not leasing the Edward Street premises to GDA but instead selling them, could not affect the reasonableness of GDA's conduct in leasing and practising at the Peter Street land. The two companies are separate legal entities and the actions of one cannot be attributed to the other. Similarly, Benantra's conduct in not purchasing suitably located premises which could be leased to GDA was irrelevant and could not affect the reasonableness of GDA's conduct.

146 GDA submitted that Dr Angus' decision not to offer obstetric services for GDA from the Peter Street land was not unreasonable. There was a risk of significant harm to mother and/or child if a treating obstetrician could not reach the hospital within five minutes. That risk was unacceptable to Dr Angus. The fact that other obstetricians might accept the risk did not make Dr Angus' decision not to accept that risk unreasonable.

147 GDA submitted that its business was always one which provided obstetric services only within limited risk parameters, including that the treating obstetrician be within five minutes of obstetric patients within the hospital. GDA was able to provide its obstetric services within those risk parameters at the Yabtree Street land. GDA was not able to provide obstetric services within those risk parameters from the Peter Street land. GDA submitted that HAC, by the acquisition of the Yabtree Street land, could not dictate that GDA change its business to one that would operate outside its previously adopted limited risk parameters. It was, therefore, not unreasonable for GDA not to change its business practice as a consequence of the acquisition: *Mitchell v Roads and Traffic Authority (NSW)* [2008] NSWLEC 258; (2008) 164 LGERA 375 at [199].

148 GDA submitted that Dr Angus' decision not to accept rooms at Calvary Hospital was also not unreasonable. Calvary Hospital was a Catholic hospital with rules that restricted medical practitioners on the premises prescribing contraceptives, inserting intra-uterine devices or prescribing drugs that would operate as an abortifacient. Dr Angus was not prepared to accept these restrictions on his obstetric or gynaecological practice. Such a decision was not unreasonable. Again, GDA submitted that it is not unreasonable for GDA not to change its business as a result of the acquisition.

149 Thirdly, GDA submitted that its move to Newcastle, and the losses it would suffer from practising only obstetrics and not gynaecology, were reasonable. GDA noted the evidence of Dr Angus that GDA's income stream from providing only gynaecological services from the Peter Street land had declined to a point where continuation of GDA's practice in Wagga Wagga was not financially viable. By this time, around 2 years after the acquisition of the Yabtree Street land, Dr Angus had lost his previously commanding position in the obstetrics field in Wagga Wagga (not having practised obstetrics for 2 years) and his gynaecological practice was in decline. GDA had two options: remain practising at the Peter Street land and continue to suffer increasing losses or move to new premises from which GDA may be able to establish a more profitable practice. GDA chose the second option, thereby minimising the losses GDA would suffer. Hence, GDA submitted, moving from the Peter Street land was reasonable.

150 The next question was whether moving to Newcastle, rather some other location, was reasonable. GDA, relying on Dr Angus' evidence, submitted that Newcastle was an appropriate location for a number of reasons:

- two of the senior visiting medical officers had indicated to Dr Angus that they would be considering retiring in the next five years;
- there are purpose built rooms available, meaning GDA would not have to find about $800,000 to buy and fit out premises;
- there are at least six other obstetricians in the same building, meaning that the risk issues that were present at the Peter Street land would be resolved;
- there are 13 practising obstetricians already at Newcastle Hospital, which means that risk management is better than in Wagga Wagga;
- Newcastle Private Hospital is not a Catholic hospital so there are no preclusions to practice based on religious grounds;
- Newcastle is the second largest market in NSW after Sydney;
- Dr Angus had worked as a senior registrar in obstetrics and gynaecology at John Hunter Hospital in Newcastle in the past, and still maintained some of the contacts he had made from back then;
- Dr Angus had family connections with Newcastle, Mrs Angus having been born and raised there and Mrs Angus and the children having moved there for the children's schooling (at [20] of 9 July 2013 affidavit).

151 GDA submitted that the existence of family connections in Newcastle did not make the decision to move to Newcastle unreasonable. It was one factor in the decision making matrix.

152 GDA submitted, therefore, that the moves initially to the Peter Street land and subsequently to Newcastle, and the incurring of losses as a consequence of practising at those locations, were reasonable.

153 GDA also submitted that such losses were a direct and natural consequence of the acquisition. The purpose of the limitation of "direct and natural" is to prevent claims for losses that do not have a proximate relationship with an acquisition and which are not foreseeable (referring to *Caruana v Port Macquarie-Hastings Council* at [52]). GDA submitted that losses caused by vacating the acquired land and moving to the Peter Street land had a proximate relationship with the acquisition and were foreseeable - they were a direct and natural consequence of the acquisition.

154 GDA conceded that the second move to Newcastle and the losses that would be caused thereby were more remote in time and circumstance. Nevertheless, GDA submitted that they still could be a direct and natural consequence of the acquisition of the Yabtree Street land because:

- the acquisition required relocation of GDA's practice to alternative premises;
- GDA's practice at those alternative premises was constrained (no obstetrics);
- GDA's practice in the relocated premises was not financially viable (as anticipated and foreseen); and
- it was necessary to relocate again in order to attempt to find a financially viable practice.

155 Hence, GDA submitted, the move to Newcastle, and the extent of loss thereby incurred, was no less a direct and natural consequence of the acquisition.

156 I will deal with each of HAC's contentions.

GDA's monthly tenancy does not limit the disturbance loss

157 First, I do not accept that, because GDA only had a lease determinable on one month's notice, the only business loss GDA could reasonably incur was a loss of one month's profits, being the difference between GDA being immediately required to vacate on the date of the acquisition (which terminated the lease) and having a month to vacate (if notice had been given under the lease determining the lease), or that GDA did not in fact incur such a loss because GDA was permitted to stay in occupation for more than a month after the land was acquired.

158 HAC uses inappropriate reference points for the comparison. The reasonableness of GDA's incurring of financial losses is not to be assessed by reference to the position GDA would have been in had Benantra given one month's notice to determine the tenancy. That of course assumes no acquisition. It is a situation over which GDA would have no control. It is also an artificial and highly unlikely event because Benantra would not have acted to determine GDA's tenancy. HAC compares this position to, firstly, the position in which GDA was put by the acquisition, namely being required to vacate at the moment the acquisition took effect. Again, this is a situation over which GDA had no control. GDA's loss derives from a comparison between these positions, but GDA would have no control as to the incurring of the loss. Moreover, there is no objective standard against which to measure the reasonableness of GDA incurring this comparative loss.

159 HAC's second position against which it compares the position GDA would have been in had there been no acquisition but Benantra had determined the tenancy on one month's notice is the date when GDA actually vacated the premises after the acquisition. This was the date agreed with HAC. HAC's argument is that GDA suffers no loss because GDA was allowed to stay longer than the one month it would have had if Benantra had determined the tenancy. But again this uses as a reference point an event where there is no acquisition, over which GDA would have no control, and which is highly unlikely to have occurred. The occupation of the land after acquisition for more than one month is not an event that is a consequence of the acquisition. There is also no objective standard over which the reasonableness of GDA's conduct and comparative gain could be measured.

GDA's losses at the Peter Street land reasonably incurred

160 HAC's second argument is that GDA's losses from practising at the Peter Street land were not reasonably incurred. I will deal with each of the ways in which HAC submitted the losses were not reasonably incurred.

161 I do not accept HAC's argument that Benantra acted unreasonably in not purchasing and leasing to GDA suitably located premises or that, even if it did act unreasonably, such conduct can be attributed to GDA or make GDA's incurring of losses from its practice at the Peter Street land to be unreasonable.

162 HAC adduced evidence about the negotiations between HAC and Benantra prior to HAC issuing the proposed acquisition notice and acquiring the Yabtree Street land. Its purpose was to establish that Benantra had notice that HAC was keen to acquire the Yabtree Street land, and, if such acquisition were to occur, Benantra would need to purchase alternative land that could be leased to GDA for it to conduct its medical practice. HAC also adduced evidence of Mr

Lunney and Mr Salvestro that in this period there were properties within the hospital precinct (within 5 minutes' drive of Calvary Hospital) which were on the market to be purchased. HAC submitted that Benantra did not act reasonably in not purchasing an alternative property in this period. The failure of Benantra to purchase an alternative property and then lease it to GDA led to GDA not being able to find suitable premises after the acquisition and therefore incurring business losses.

163 I do not consider this evidence to be relevant. A person who has an interest in land that might be divested, extinguished or diminished by a proposed acquisition has no legal obligation to purchase alternative land prior to the acquisition occurring and compensation being paid. Only on publication of an acquisition notice does the land vest in the acquiring authority and the person become entitled to compensation. Until that time, the person does not act unreasonably by not taking action to minimise the amount of compensation to which that person would be entitled to be paid by the acquiring authority, let alone minimising the amount of compensation to which another person with an interest in the land that has been extinguished would be entitled to be paid by the acquiring authority. Hence, Benantra was not obliged, before the Yabtree Street land was acquired, to look for or purchase alternative land to be leased to GDA to conduct its medical practice.

164 In any event, Benantra's conduct in not purchasing alternative premises before the acquisition cannot be attributed to GDA and cannot cause GDA's conduct of moving to and practising from the Peter Street land to be unreasonable.

165 For the same reasons, Benantra did not act unreasonably in selling the Edward Street premises that it owned prior to the acquisition taking effect, rather than retaining and leasing those premises to GDA for it to conduct its medical practice from there if and when GDA was required to vacate the Yabtree Street land upon acquisition by HAC. However, in any event, GDA cannot be said to have acted unreasonably because of Benantra's conduct in selling the Edward Street premises.

166 For completeness, I also find that GDA did not act unreasonably in not itself purchasing alternative premises from which it could conduct its medical practice. GDA had only a leasehold interest in the Yabtree Street land that would be extinguished if HAC were to acquire that land. The compensation to which GDA would become entitled would arise from the extinguishment of GDA's interest in the land. GDA was under no legal obligation to incur financial costs to acquire a greater estate or interest in alternative land than would be extinguished by the acquisition. GDA was also under no obligation to take action to purchase alternative land before HAC issued a proposed acquisition notice and acquired the land. Finally, it is not unreasonable for a person who has an interest in land that might be extinguished by a proposed acquisition

to defer taking steps to purchase alternative premises until compensation is agreed or determined: see *Macarbell Pty Ltd v Roads and Traffic Authority (NSW)* [2006] NSWLEC 651; (2006) 149 LGERA 217 at [33].

167 In relation to properties available to lease after the giving of the proposed acquisition notice, neither HAC's evidence, including that of Mr Lunney and Mr Salvestro, nor GDA's evidence, principally of Mrs Angus who searched for properties to lease, established that there were any premises in the hospital precinct (within 5 minutes' drive to Calvary Hospital) available for lease. Mrs Angus' evidence was that the only premises that was available was that at 90 Peter Street which GDA ultimately leased. Hence, I reject HAC's contention that the losses incurred by GDA in leasing the Peter Street land and conducting its medical practice from that land, rather than other land in Wagga Wagga, were incurred unreasonably.

168 I also do not accept HAC's contention that GDA acted unreasonably in not leasing rooms at Calvary Hospital, either in lieu of or in addition to the Peter Street land. Dr Angus explained in his evidence the reasons for his inhibitions in conducting the whole or part of his obstetric practice in a Catholic hospital which restricted certain medical procedures. Those reasons are not unreasonable. It is not to the point, as HAC had submitted it was, that other doctors had accepted, or might be prepared to accept, those restrictions on medical practice. The limitation in s 59(f) that financial costs be incurred reasonably does not require the person entitled to compensation to alter their business in fundamental aspects: see *Mitchell v Roads and Traffic Authority (NSW)* at [199].

169 This brings me to HAC's contention that GDA acted unreasonably in not providing obstetric services once GDA moved to the Peter Street land on the basis that Dr Angus could not reach his obstetric patients at either the base hospital or Calvary Hospital within 5 minutes' drive.

170 HAC submitted, first, that there was no standard which required an obstetrician to practise or live within 5 minutes of the hospital. None of the doctors who gave evidence in the case (Drs Kraus, Nicholl or Mourik) agreed that there was such a standard. Secondly, HAC submitted that 5 to 10 minutes travel time was acceptable. This was Dr Mourik's evidence. HAC submitted that the evidence established that normal travel time from the Peter Street land to Calvary Hospital was within 10 minutes. Dr Kraus, who was familiar with the area and was a locum obstetrician/gynaecologist at the base hospital, noted that the expected travel time would be 6-7 minutes and that he had personally driven the route in less than 5 minutes. Mr Salvestro, a planner working in Wagga Wagga for 25 years, noted that the Peter Street land was outside a 5 minute travel time radius but within a 10 minute travel time radius and that he had personally driven the route on three occasions taking

between 5 and 7 minutes. Dr Angus' own evidence was that he had driven from the Peter Street land to Calvary Hospital in under 10 minutes and once under 5 minutes.

171 Thirdly, HAC submitted that Dr Angus has not acted consistently with a maximum 5 minute travel time rule. Dr Angus' private residence was further away from Calvary Hospital than was the Peter Street land. Dr Angus had also practised at 8 Simmons Street, which was also further away from Calvary Hospital than the Peter Street land. The property at 8 Simmons Street was more than 10 minutes travel time from Calvary Hospital.

172 GDA rebutted HAC's contentions. Dr Angus' evidence was that: the Peter Street land was in distance and travel time further from Calvary Hospital than the Yabtree Street land; the greater the distance and travel time for an obstetrician to reach the patient, the greater the risk to the patient and baby; to be within 5 minutes of the hospital was ideal and desirable - the nearer the better; he was more risk adverse than other obstetricians; as a sole practitioner, he was not able to manage the risk that he found to be unacceptable; Calvary Hospital was a small rural hospital lacking an obstetric registrar, other obstetricians who could provide backup if he took longer to attend than 5 minutes, or a first responder midwife with high skill levels; his home, whilst further away in distance terms, was quicker to drive, because of less traffic lights and there being no need to cross the highway, than was the Peter Street land; and the practice at 8 Simmons Street, whilst also further away in distance terms, had the benefit of a suite at Calvary Hospital and was operated, at the time, in conjunction with four other obstetricians who worked a roster using both sets of rooms and hence could provide back-up for him in emergencies.

173 GDA submitted that, before the acquisition, it was able to provide obstetric services at premises at an appropriate level of risk, being within 5 minute of the hospital. A consequence of the acquisition was that GDA needed to move to premises that were greater than 5 minutes from the hospital and hence GDA was no longer able to provide services within the same risk. GDA therefore acted reasonably in ceasing to provide obstetric services from the Peter Street land rather than accept a higher level of risk.

174 I find that GDA acted reasonably in ceasing to provide obstetric services after it moved its practice to the Peter Street land. The Peter Street land was undoubtedly further in distance and travel time from Calvary Hospital (where Dr Angus was by this time solely providing obstetric services) than the Yabtree Street land. The travel route from the Peter Street land to the Calvary Hospital necessitated passing through traffic lights and crossing the highway. Whilst many times this might not cause delay, on some occasions there will be delay for many minutes. Those occasions might well be when speed was of the

essence for the obstetric patient and baby.

175 The medical evidence was unanimous that the greater the travel time, the greater the risk. The level of risk that is acceptable is not fixed by any medical standard. It is a personal matter for each obstetrician. None of the obstetricians giving evidence said that Dr Angus' personal requirement of being within 5 minutes was unreasonable or that his decision not to continue to offer obstetric services if he could not guarantee to reach his obstetric patients within 5 minutes was unreasonable. I accept that, in determining the level of risk that is acceptable, it is relevant to consider the particular hospital concerned and its facilities and medical staff available. The availability at the hospital of an obstetric register, other obstetricians who could provide backup, and highly trained and experienced midwives would lessen the risk if the treating obstetrician were not able to reach the hospital within 5 minutes, but conversely the unavailability of such staff increases the risk. The reasonableness of GDA's decision needs to be evaluated having regard to these factors as well.

176 In summary, I find that GDA acted reasonably in deciding not to continue to provide obstetric services from the Peter Street land, and hence the financial losses it might incur from that decision were incurred reasonably.

177 However, there is a temporal limit to how long it might be reasonable for GDA to incur losses by remaining at the Peter Street land and continuing to provide only gynaecological and not obstetric services. The adverb "reasonably", which qualifies "incurred" and "might be incurred" in s 59(f), imports a temporal aspect - the incurring of financial costs must continue over time to be reasonable.

178 In this case, I consider that GDA needed to take action to stem the losses it was incurring by practising only gynaecology at the Peter Street land after a period of two years. This was in fact what GDA determined to do. After two years of practising at the Peter Street land and with a deteriorating income, GDA determined to relocate its practice from the Peter Street land. That decision was reasonable. GDA could not reasonably continue to incur losses at the Peter Street land. However, GDA determined to relocate its practice to Newcastle. I find below that relocation of its practice to Newcastle and incurring losses as a result were not reasonable.

179 Hence, I find that GDA reasonably incurred financial losses from the time it ceased to practice at the Yabtree Street land until it ceased to practice at the Peter Street land but if it had continued to incur financial losses after that point in time, those losses would not have been reasonably incurred.

GDA's losses at the Peter Street land a direct and natural consequence of acquisition

180 I also do not accept HAC's contention that the financial losses that GDA incurred by not providing obstetric services at the Peter Street land were not a direct and natural consequence of the acquisition. The acquisition of the Yabtree Street land was the proximate cause of GDA having to relocate its obstetric and gynaecological practice from the Yabtree Street land to the Peter Street land. An obstetrics practice is dependent on proximity to the hospital with the obstetric patients. The Peter Street land was located further away in distance and travel time from Calvary Hospital than was the Yabtree Street land. A foreseeable consequence of the move from the Yabtree Street land to the Peter Street land was an adverse effect on GDA's obstetric practice. Hence, GDA's incurring of a financial loss by not providing obstetric services at the Peter Street land was a direct and natural consequence of the acquisition of the Yabtree Street land.

GDA's losses in Newcastle not a direct and natural consequence of acquisition

181 I will now deal with GDA's second move to Newcastle and the financial losses it contended it might incur by practising only obstetrics and not gynaecology in Newcastle. I view this second move and the losses GDA contended it might incur thereby differently to the first move to the Peter Street land. I find the second move to Newcastle to be unreasonable and the concomitant losses to not be reasonably incurred or a direct and natural consequence of the acquisition of the Yabtree Street land.

182 First dealing with the latter requirement, the acquisition is not the direct or proximate cause of the move to Newcastle. As GDA noted, the profitability of its practice of only gynaecology and not obstetrics at the Peter Street land, two years after the acquisition of the Yabtree Street land, had declined to a point where GDA considered it needed to relocate its practice. GDA chose to relocate to Newcastle, for the reasons given by Dr Angus. However, GDA determined that it would not attempt to compete in the market for gynaecological services in Newcastle, but would restrict itself to offering only obstetric services. Dr Angus gave his reasons for that decision, which all related to the market for gynaecological services in Newcastle and Dr Angus' perceived lack of competiveness in that market. Hence, the relocation to Newcastle was the direct consequence of the reduced financial profitability of GDA's practice at the Peter Street land, and GDA's projected loss by offering obstetric and not gynaecological services was a direct consequence of GDA's lack of competitiveness in the particular Newcastle market. Neither the relocation to Newcastle nor GDA's projected loss in Newcastle was a direct consequence of the acquisition of the Yabtree Street land. The acquisition of the Yabtree Street land, at best, was only an indirect cause of either. This is insufficient to satisfy s 59(f).

183 The projected loss that GDA might incur in Newcastle was also not a foreseeable consequence of the acquisition of the Yabtree Street land, so as to be a "natural" consequence.

GDA's losses in Newcastle not reasonably incurred

184 I also find that the projected loss that GDA might incur in Newcastle by providing only obstetric services and not gynaecological services is not reasonable.

185 I have earlier found that it was reasonable for GDA to have relocated to the Peter Street land, to have suspended the provision of obstetric services from that land because of the risk to obstetric patients by the increased distance and travel time to Calvary Hospital, and to have incurred losses as a result. I have also held that, after incurring losses for two years by practising only gynaecology at the Peter Street land, GDA acted reasonably in determining to relocate from those premises.

186 However, GDA's actions to relocate its practice to Newcastle and then to only provide obstetric services but not gynaecological services through Dr Angus for the next 11 years until he retires at 67, and to incur losses as a result, were not reasonable. Dr Angus' evidence was that there was a synergy between offering both obstetric services and gynaecological services. He said "it is my experience that general practitioners have a preference for referring patients to a gynaecologist that also conducts obstetrics practice and an obstetrics patient will have a preference to be treated by the same specialist for gynaecological matters" (at [46] of 3 May 2012 affidavit). Dr Angus' complaint about the Peter Street land was that GDA was not able to offer both obstetric and gynaecological services, only gynaecological services.

187 Yet GDA decided to relocate from the Peter Street land to Newcastle where GDA would have to "establish a medical practice from scratch" and where Dr Angus would "have no patient base and no referral base" (at [16] of 9 July 2013 affidavit). Moreover, Dr Angus would only offer obstetric services, not gynaecological services, as Dr Angus perceived that he would not be competitive as a gynaecologist in the more specialised gynaecological market in Newcastle. Dr Angus perceived that in Newcastle:

> [b]ased on my own general experience and knowledge of patient referrals, sub-specialist practitioners are considered to be the better or are the preferred option for general practitioners to refer their patients to, in a market as large as Newcastle, because they practise exclusively in a more narrow field of expertise and are therefore perceived to offer a better service. The sub-speciality areas encompass all of the areas of gynaecology and some of the areas of obstetrics. (at [19] of 9 July 2013 affidavit).

188 The move to Newcastle, therefore, would not solve GDA's problem of not being able to provide both obstetric and gynaecological services. It would simply

reverse the services offered by GDA - from offering gynaecological but not obstetric services at the Peter Street land to offering obstetric but not gynaecological services at Newcastle. Moreover, on Dr Angus' evidence, GDA will not even try to offer any gynaecological services in Newcastle, and hence try to earn any income from providing gynaecological services, for the remainder of Dr Angus' working life. Losses incurred as a result of this conduct are not incurred reasonably.

189 Dr Angus sought to justify the move to Newcastle, notwithstanding these problems and projected losses, on the basis that it would be better than attempting to re-establish himself as an obstetrician in Wagga Wagga after a break of two years whilst he was practising at the Peter Street land. However, many of the aspects that contributed to the financial success of GDA's practice at the Yabtree Street land still remained. Dr Angus described himself as being "higher qualified", having "more experience" and being in specialist practice in Australia for longer than other obstetricians in Wagga Wagga. Dr Angus used to and could again offer a broad range of obstetric services and he had and could again have a comparatively lower caesarean rate which is preferable to a lot of patients. Dr Angus had developed and could re-establish professional relationships with general practitioners, who had and could again refer patients to him (at [18] of 17 October 2012 affidavit). Having regard to Dr Angus' skill, knowledge, experience and reputation in Wagga Wagga, I do not accept Dr Angus' opinion that it would be more difficult, and involve a greater financial risk, to re-establish his obstetrics practice in Wagga Wagga than it would be to start from scratch in an unknown and more competitive market in Newcastle.

190 In these circumstances, I consider that the incurring of financial losses that GDA is projected to incur by relocating its practice to Newcastle and that only offering obstetric and not gynaecological services for the remainder of Dr Angus' working life are not reasonable.

191 In summary, I find that the financial losses that GDA might incur by practising in Newcastle would not be reasonably incurred and would not be a direct and natural consequence of the acquisition.

THE AMOUNT OF COMPENSATION TO WHICH GDA IS ENTITLED

192 As a result of the findings above, GDA is entitled to the financial losses it incurred during the period it practised at the Peter Street land, under s 59(f). The financial loss GDA incurred, in the period from when GDA vacated the Yabtree Street land to when GDA vacated the Peter Street land (assumed to

be 30 June 2013), was the difference between what GDA would have earned by practising at the Yabtree Street land and what GDA actually earned at the Peter Street land. The parties disagreed, however, on how GDA's earnings should be calculated.

193 GDA's first method was to use the profit before payment of remuneration to Dr Angus. The second and third methods used the profit after payment of remuneration to Dr Angus. The difference between the second and the third methods was that, in the second method, the remuneration was what the market would have paid for a doctor of Dr Angus' skill, knowledge and experience while in the third method the remuneration was what Dr Angus was actually paid by GDA.

194 GDA contended that the first method was the preferable one. GDA contended that, before the acquisition, the director of GDA (Dr Angus) was able to determine, in his sole discretion, whether the net profit that had been earned should be disbursed by payment of a salary to Dr Angus or by distribution to the shareholders (being Dr Angus and Mrs Angus). GDA submitted that this ability should not be impacted by the compulsory acquisition.

195 HAC submitted that this was not an appropriate method to determine GDA's loss. The adverse effect the acquisition might have had on the ability of Dr Angus as the sole director of GDA to direct how the net profit of GDA was to be distributed was not compensable under s 59(f). Rather, it is the loss that GDA reasonably incurred as a direct and natural consequence of the acquisition that was to be compensated. That loss is a comparison, in the two situations, of the income earned less the expenditure incurred to earn that income. A major item of expenditure was the remuneration of the only income earner, Dr Angus. That needed to be taken into account.

196 I agree with HAC that GDA's loss for the purposes of s 59(f) is to be determined by reference to the income after payment of remuneration to Dr Angus.

197 The next question is whether the remuneration should be what the market would pay as fair remuneration or what GDA actually paid as remuneration to Dr Angus. In my view, use of the actual remuneration paid to Dr Angus is the appropriate method in the circumstances of this case, not a hypothetical fair market remuneration. The inquiry required by s 59(f), for losses already incurred, is to ascertain what were the actual losses that had been incurred, relating to the actual use of the land, as a direct and natural consequence of the acquisition, subject to finding that those losses were reasonably incurred. Hence, the remuneration GDA actually paid in the period in which it incurred losses whilst practising at the Peter Street land is prima facie the relevant figure to be used. I say prima facie because s 59(f) does impose an objective standard - the losses incurred (and hence items of income and expenditure

making up those losses) are to be "reasonably" incurred. If an item of expenditure, such as the remuneration paid, was unreasonable, an adjustment might legitimately be made to the item to ensure its reasonableness. In this case, the remuneration actually paid by GDA to Dr Angus, although not determined at arm's length, nevertheless is not so unreasonable that an adjustment needs to be made to it.

198 Applying this third method, Dr Ferrier (called by GDA) determined that GDA's past loss to 30 June 2013 was $1,539,688. The interest on that past loss to 30 June 2013 was $96,174 (paragraph 1.9 of Ferrier report 10 July 2013). HAC, including its expert Mr Samuel, did not contest that these amounts were appropriately calculated, if the assumptions and the third method were to be used. I accept these figures of $1,539,688 and the calculated interest of $96,174.

199 In summary, I find that the amount of compensation to which GDA is entitled should be determined having regard to:

- under s 59(c): the financial costs reasonably incurred in connection with the first relocation of GDA from the Yabtree Street land to the Peter Street land of $16,129.22, plus interest to the date of judgment on this sum; and

- under s 59(f): the financial costs reasonably incurred, relating to the actual use of the land, as a direct and natural consequence of the acquisition of $1,539,688, plus interest (being $96,174 to 30 June 2013 plus additional interest to the date of judgment) on this sum.

200 GDA's claim for compensation should therefore be determined by an award of compensation in the amount that is the aggregate of these sums and the calculated interest.

DIRECTIONS

201 I direct the parties to agree and to file with the Court a schedule calculating the interest on these sums to a date of judgment of 19 December 2013 and short minutes of order awarding the total amount of compensation, being the aggregate of the sums found above and the calculated interest on those sums. I direct that the schedule and short minutes of order be filed by 18 December 2013. If agreed, I will make orders in chambers thereafter. If not agreed, I give liberty to the parties to relist the matter before me on one day's notice for the purpose of hearing argument on the calculation of interest and total amount of compensation.

COSTS OF THE PROCEEDINGS

202 In relation to costs, GDA will have been successful in obtaining an award of compensation in an amount in excess of the amount offered by HAC (as determined by the Valuer-General), thereby vindicating GDA's objection to the amount of compensation offered and lodging of these proceedings. GDA has also been successful in obtaining an amount of compensation greater than the amount contended for by HAC in these proceedings. In this respect also, GDA has been successful. GDA has, therefore, acted reasonably in both objecting to HAC's offer of compensation and pursuing these proceedings. GDA has not conducted the proceedings in a manner which gives rise to unnecessary delay or expense. In these circumstances, GDA should be entitled to recover the costs of the proceedings: *Dillon v Gosford City Council* [2011] NSWCA 328; (2011) 184 LGERA 179 at [70]-[72]. The short minutes of order should include an order that HAC pay GDA's costs of the proceedings.

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Amendments

17 December 2013 - [98] effect changed to affect[182] obstetrics changed to obstetric
Amended paragraphs: [98], [182]

Decision last updated: 02 January 2015